88-676

Supreme Court, U.S.
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NUMBER:

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

JERRY W. IKARD, D/B/A
IKARD MANUFACTURING COMPANY

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

ULTIMATE QUESTION

Did the United States Court of Appeals for the Eleventh Circuit err in affirming the United States District Court for the Northern District of Alabama's Rule 12(b)(1) and 12(b)(6) dismissal of Petitioner's cause of action?

SUBSIDIARY QUESTIONS

I. Do violations by United States of America employees of due process and equal protection laws guaranteed by a state constitution create a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b)?

II. Are violations by United States of America employees of Federal Statutes, Federal Acquisition

Regulations, and the United States Constitution, in and of themselves, the applicable state law sufficient to create a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b)?

III. Do violations by United States of America employees of Federal Statutes, Federal Acquisition Regulations, and the United States Constitution, create a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), when they are incorporated into a state statute which has been violated?

IV. Did Plaintiff-Petitioner state a claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b)?

V (a). Are violations, by United States of America employees, of

Federal Statutes, Federal Acquisition Regulations, the United States Constitution, Alabama Common Law, Alabama Statutes, and the Alabama Constitution excepted by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2680(a)?

V (b). Are violations, by United States of America employees, of Federal Statutes, Federal Acquisition Regulations, the United States Constitution, the Alabama Constitution, and Alabama statutes conduct excepted from the Federal Tort Claims Act 28 U.S.C. 2680(h) under, as Respondent-Defendant contends, the "no analogous private liability exception"?

VI. Does an overlap between two

distinctly separate state tort actions, when one is specifically excepted from the Federal Tort Claims Act by Section 28 U.S.C. 2680(h), create an exception with respect to both such actions?

LIST OF ALL PARTIES

1. Jerry W. Ikard, doing business as Ikard Manufacturing Company, is the Petitioner herein, was Appellant in the Court of Appeals, and was Plaintiff in the District Court. Petitioner, Jerry W. Ikard, is an individual person. Ikard Manufacturing Company is a sole proprietorship wholly owned by Jerry W. Ikard, is the name by which Jerry W. Ikard does business, is not a corporation, and has no parent companies, affiliates, or non wholly-owned subsidiaries or the like.

2. United States of America; is the Respondent herein, was Appellee in the Court of Appeals, and was

Defendant in the District Court.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit, _____ F.2d _____ (1988), entered June 30, 1988, is attached in Appendix A.

The Opinion of the United States District Court for the Northern District of Alabama, _____ F.Supp. _____ (1987),

entered December 31, 1987 and dismissing Petitioner's cause of action under Federal Rules of Civil Procedure Rules 12(b)(1) and 12(b)(6), is attached in Appendix A.

JURISDICTION STATEMENT

Jurisdiction of this Petition for Writ of Certiorari is conferred upon the United States Supreme Court by Section 1254(1) of Title 28 of the United States Code. Review is sought, pursuant to Supreme Court Rule 17.1(c), of the dismissal decree entered on December 31, 1987 by the United States District Court for the Northern District of Alabama and of the order affirming dismissal entered on June 30, 1988, by the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1254(1):

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

15 U.S.C. 637(a)(1): See Appendix.

15 U.S.C. 637(b)(7): See Appendix.

28 U.S.C. 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution,

laws, or treaties of the United States.

28 U.S.C. 1346(b): See Appendix.

28 U.S.C. 2680(a): See Appendix.

28 U.S.C. 2680(h): See Appendix.

Title 48, Code of Federal Regulations:

FAR 9.402(b): See Appendix.

FAR 9.406-2 Causes for Debarment: See Appendix.

FAR 9.406-3(b) Procedures. Decision-making process. See Appendix.

FAR 9.407-2 Causes for Suspension. See Appendix.

DOD FAR Supplement 9.472-2: See Appendix.

Army FAR Supplement 9.493. Debarment and Suspension Procedures. See Appendix.

Article I, Section 1, of the Constitution of Alabama of 1901:

That the great, general, and essential principles of liberty and free government may be recognized and

established, we declare:

Section 1. Equality and Rights of Men. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

Article I, Section 6, of the Constitution of Alabama of 1901:

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:

Section 6. Rights of persons in criminal prosecutions generally; self-incrimination; due process of law; right to speedy, public trial; change of venue. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy

thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecution by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the

time of the application of the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

Article I, Section 22, of the Constitution of Alabama of 1901:

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:

Section 22. Ex post facto laws; impairment of obligations of contracts; irrevocable or exclusive grants of special privileges immunities. That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

Code of Alabama, 1975, Section 34-3-20(1): It is the duty of attorneys: (1) to support the Constitution and laws of this state and of the United States.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Ikard Manufacturing Company requests the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit directing the Court of Appeals to (1) vacate its Order affirming the Order of the United States District Court for the Northern District of Alabama which dismissed, pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure, Plaintiff-Petitioner's cause of action and (2) enter an order reversing and remanding the aforementioned dismissal order and directing the District Court to proceed to trial with the Plaintiff-Petitioner's action.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

This action is brought by Jerry W. Ikard d/b/a Ikard Manufacturing Company (hereinafter "Ikard") versus the United States. The Complaint, filed June 16, 1987, claims damages, pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), on the grounds that Ikard had been "blacklisted" and de facto debarred by employees of the United States, that the negligent withholding of evidence and submission of erroneous information in regarding Ikard's debarment proceeding deprived Ikard of due process of law, as guaranteed under Article 1, Section 6 of the Alabama Constitution of 1901, that the length of Ikard's debarrment violated the equal protection of the laws as guaranteed by Sections 1, 6, and 22 of Article 1 of the Alabama Constitution of 1901, that United

States' employees negligent compliance with Federal Regulations constituted negligence and negligence per se under the laws of the State of Alabama, and that the negligence of attorney-employees of the United States violated Section 34-3-20(1), of the Code of Alabama (1975) and constituted negligence and negligence per se. The Complaint was served on the United States in accordance with Rule 4, Federal Rules of Civil Procedure. On August 17, 1987, the United States filed its Rule 12(b)(1) and (6) Motion to Dismiss, stating that Plaintiff failed to satisfy the "law of the place" requirement of 28 U.S.C. 1346(b), that Plaintiff alleged tortious interference with contract rights and misrepresentation, both exempted from the F.T.C.A. by 28 U.S.C. 2680(h), and that the actions of employees of the

United States involved a discretionary function exempted from the Federal Tort Claims Act by 28 U.S.C. 2680(a). On December 31, 1987, the District Court dismissed the action pursuant Rules 12(b)(1) and (6) and adopted Defendant-Respondent's Memorandum of Law as its own.

The United States Court of Appeals, Eleventh Circuit, after Ikard's appeal, affirmed the District Court's dismissal on June 30, 1988.

C. FACTS

Jerry W. Ikard is sole owner of Ikard Manufacturing Company of Meridianville, Alabama. Ikard manufactures machined and electronic items and components utilized for missile and rocket system repair and replenishment by the United States Army. Ikard's primary customer is the U.S. Army Missile Command (hereinafter "MICOM") in Redstone

Arsenal, Alabama. Ikard has been doing business for approximately 20 years with MICOM and has structured its operations to meet the stringent quality control and inspection requirements of United States Department of Defense agencies. Ikard cannot modify its operations to produce commercial parts without a substantial outlay of capital and change in its personnel and general business operations.

In approximately 1977 or 1978, Jerry W. Ikard had personality conflicts with MICOM employees in its Repair Parts Branch of the Procurement and Production Directorate and, consequently, several MICOM employees were "out to get him" or "put him in his place". Relations between Ikard and MICOM employees deteriorated.

Ikard was delinquent on many contracts. However, as opposed to many

of his competitors, MICOM employees strictly construed contracts against him and terminated them for default while competitors with equal or longer delinquencies were allowed to complete their jobs. These default terminations caused Ikard cash flow problems which, in turn, exacerbated the conflicts between Ikard and MICOM employees. The more Ikard complained, the more stringent and harsh MICOM employees became with him.

In 1986, a former MICOM employee affidavit stated that, in late 1981, MICOM supervisory employees promulgated a list of "problem contractors". Ikard's name was on the list. These supervisors told their employees to avoid awarding contracts to Ikard if at all possible. Such conduct violated Subpart 9.4 of the Federal Acquisition Regulations (hereinafter "FAR") and its

predecessors (Defense Acquisition Regulations and Armed Services Procurement Regulation). From information obtained pursuant to the Freedom of Information Act (hereinafter "FOIA"), Ikard discovered that MICOM employees attempted to have Ikard formally debarred every year from at least 1981 through 1984 (when they obtained a one year debarment). In addition to the formal one year debarment, Ikard was suspended for the six months preceding the debarment. Ikard was unable to market, as a contractor or subcontractor, to its only major customer for 18 months.

Ikard contends MICOM employees violated numerous sections of the FAR, to-wit: Section 9.402(b) [debarment is for protection of the Government's interest, not for punishment], Section 9.406-3(b) [debarment procedures must be

"consistent with principles of fundamental fairness"], Section 9.472-2 (DOD supplement) [the MICOM administrative report compiled for the debarring official should contain a summary of "all pertinent evidence"], and Section 9.493 (Army supplement) [debarment proceedings are "non-adversarial in nature"; no regulations provide for discovery by Ikard].

The suspension and debarment of Ikard caused substantial damage.

Ikard was suspended and debarred because of "a history of failure to perform or unsatisfactory performance of one or more contracts." MICOM employees negligently withheld information that there had been 6 entities debarred for a history of failure to perform out of 168 debarred firms and individuals. Of the six, several were in bankruptcy when failing to perform. The overwhelming

majority were for criminal conduct.

MICOM employees negligently withheld information proving that several MICOM contractors had performance records and delinquency histories similar or worse than Ikard's and proving that Ikard had an excessively large number of pre-award surveys, i.e., ten times as many as the contractor with the next largest number.

These pre-award surveys contributed to Ikard's delinquencies by requiring scarce management time. A pre-award survey can take 2 to 3 days and causes disruptions for small businesses like Ikard.

MICOM employees negligently gave an erroneous Ikard delinquency rate to the Army Debarring Official.

15 U.S.C. 637(b)(7) requires the Small Business Administration (hereinafter "SBA") to be the sole and final determinant of the responsibility of

small business concerns. U.S. Army officials and employees negligently failed to do so. Ikard requested restoration of its security clearance on January 10, 1986. Contractors with no history of a security clearance have had their clearances approved in a matter of days. Ikard's was restored 5 months later on June 2, 1986.

In December, 1986, MICOM solicited contract DAAH01-87-R-0091 (TOW-2 missile cable assemblies) and a MICOM employee told the SBA Ikard was "blacklisted" by MICOM. Blacklisting is prohibited by federal statutes and regulations.

Ikard was unaware of these facts until it received FOIA documents FOIA in February, 1986. On June 18, 1986, Ikard submitted its Administrative Claim pursuant to the Federal Tort Claims Act for Five Million Dollars. This claim was denied December 31, 1986.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

I. VIOLATIONS BY UNITED STATES' EMPLOYEES OF DUE PROCESS AND EQUAL PROTECTION LAWS GUARANTEED BY A STATE CONSTITUTION CREATE A CAUSE OF ACTION UNDER THE FTCA, 28 U.S.C. 1346(b).

Ikard complains of due process and equal protection violations protected by the Constitution of Alabama, 1901, Sections 1, 6, and 22 and by Alabama courts. These Alabama rights are analogous or identical to the United States' Constitution's due process and equal protection clauses. Alabama's Due Process clause applies in civil cases. Pike v. Southern Bell Telephone & Telegraph Co., 263 Ala. 59, 81 So.2d 254 (1955); Smith v. Burton, 283 Ala. 391, 217 So.2d 540 (1968); Ross Neely Express, Inc. v. Alabama Department of Environmental Management, 437 So.2d 82 (Ala. 1983).

Likewise, equal protection rights guaranteed under the Federal Constitu-

tion are analogous or identical to rights guaranteed by the Alabama Constitution. See Ford v. State, 356 So.2d 720 (Ala.Crim.App. 1978), cert. denied, 356 So.2d 723 (Ala. 1978); Tartar v. James, 667 F.2d 964 (11th Cir. 1982); Black v. Pike County Commission, 360 So.2d 303 (Ala. 1978), aff'd, 375 So.2d 255 (1979); Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939).

Does a violation of due process and equal protection rights protected by Alabama's Constitution and courts create a Federal Tort Claims Act (FTCA) cause of action? Yes. While some courts hold that a Federal Constitutional Tort does not, by itself, create a FTCA cause of action, there is no holding deciding whether a State Constitutional Tort (or a Federal Constitutional Tort analogous or identical to provisions of a State Constitution) creates a Federal Tort

Claims Act cause of action. There are decisions suggesting that the existence of "analogous state duties" causes the FTCA to come into play.

In Art Metal-USA, Inc. v. United States, 753 F.2d 1151 (D.C.Cir., 1985), the Court, at 1157, stated that "the violation of the Federal Statute by Government Officials does not **of itself** create a cause of action under the FTCA." (emphasis added). The Court at 1157 added that "duties set forth in federal law do not automatically create a duty cognizable under local tort law. **The pertinent inquiry is whether the duties set forth in the Federal law are analogous to those imposed under local tort law.**" (emphasis added). The Court cited Zabala Clemente v. United States, 567 F.2d 1140 at 1149 (1st Cir., 1977) ("even where specific behavior of Federal employees is required by Federal

Statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability."). Art Metal added, at 1157:

> [Federal] Regulations may nevertheless be important in determining whether the Government may be liable for negligence under the FTCA. First, the regulations may provide evidence that the Government has assumed duties analogous to those recognized by local tort law...

and at 1159:

> If the pertinent regulations are found to have imposed a duty analogous to a local law duty, the regulations also may provide the standard and care against which the Government's conduct should be assessed. See Canadian Transport, 663 F.2d 1081 (Breach of Tort Duty "may be proven in an action against the United States by reference to standards applicable to individual employees"); Swaboda v. United States, 662 F.2d 326, 330 (5th Cir., 1981) (conduct of FAA Air Controllers can be assessed with relevance to FAA Manuals), cert. denied 457 U.S. 1134 (1982). Moreover, depending on the jurisdiction and the law violated, the latter inquiry may result in the conclusion that violation of the relevant law constituted negligence per se. Schindler, 661 F.2d 561.

The Court summarized that "The correct analysis, then, is to ask whether a cause of action exists under District of Columbia law for the injuries Art Metal alleges." After discussing the failure of Government Officials to give Art Metal due process required by procurement regulations and the deprivation of Art Metal's liberty interests, the Court found these were rights guaranteed under the United States Constitution, not under District of Columbia law. In this action, and in contrast to Art Metal, due process and equal protection are rights protected under local law (Sections 1, 6, and 22 of Article I of the Constitution of Alabama of 1901). Under Art Metal, Ikard's FTCA suit should have survived a Rule 12(b)(1) and (6) motion to dismiss.

The same result was found in Donahue v. United States, 459 F.Supp. 455

(D.C.E.MI 1978) where the Court held violation of debarment and suspension regulations by Federal employees was negligence per se under Arizona law. Ibid at 468. The duties in Donahue derived solely from Federal Regulations protecting the individual subject of the debarment and suspension actions.

In Myers v. Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2nd Cir., 1975), the Court discussed whether refusal to grant a hearing in a debarment matter was an FTCA cause of action. The key question is whether "the laws of the locus of this action would provide for recovery where a firm is black-listed or debarred from contracting without being provided an opportunity to appeal and challenge the reasons for that action." 527 F.2d at 1260. Neither party briefed whether blacklisting or debarrment without a

hearing granted an FTCA cause of action. The Court stated "We do not, however, at this point, consider by any means frivolous the Appellant's argument that blacklisting without a hearing is tortious conduct." and added, at 1260 and 1261:

> Accordingly, appellants may well be able to show the Postal Service action here was a "wrongful act" constituting the tort of interference with a business opportunity or prospective advantage... It is also possible that the failure of the Postal Service to comply with its own regulations, to provide a hearing before taking action constituting debarment may be treated under state law as negligence per se. In cases where a law is designed for the protection of a given class of persons, its violation results in injury to a member of that class, at least some states will find that the statutory violation is evidence of a breach of due care, even if not negligence per se.

Similarly, in Cecile Industries, Inc., and John Miller v. United States, 793 F.2d 97 (3rd Cir., 1986), failure to follow procurement regulations was not

shown to constitute negligence under Pennsylvania law. There was no discussion of whether analogous duties under any Pennsylvania law required was similar to fundamental fairness and due process as set forth in federal procurement regulations and the United States Constitution.

In Avery v. United States, 434 F.Supp. 937 (D.C.Conn., 1977), an action against the United States to recover under the FTCA for injuries sustained as a result of Government agents illegally opening his mail, Avery sued for a Constitutional tort (invasion of privacy prohibited by the Fourth Amendment). The Court appeared to conclude that violation of a United States Constitution provision is a tort pursuant to Connecticut local law.

Since Ikard alleges a violation of equal protection and due process, rights

protected by Alabama law, Ikard properly alleged a violation of the FTCA and the District Court's dismissal is error.

II. FEDERAL STATUTES, FEDERAL ACQUISITION REGULATIONS, AND THE UNITED STATES CONSTITUTION ARE, IN AND OF THEMSELVES, THE APPLICABLE STATE LAW UNDER THE FTCA AND THEIR VIOLATION BY UNITED STATES' EMPLOYEES IS SUFFICIENT TO CREATE A CAUSE OF ACTION UNDER THE FTCA.

While some decisions find a FTCA remedy when violations of Federal statutes and regulations by Government employees are based on analogous state duties, others make no reference to analogous duties and hold that Federal law is the applicable local law. Under these holdings, Ikard's FTCA claim is valid since he alleges violations of the United States Constitution, a federal statute or a federal regulation.

Hatahley v. United States, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956), concerns Department of the

Interior Range Managers who wrongfully, negligently and discriminatorily removed horses of the Plaintiff Navajo Indians (who grazed them freely on the range). The Range Managers destroyed Plaintiffs' horses pursuant to a state statute which provided that "abandoned horses on the open range could be eliminated." The District Court awarded damages for violations of the Taylor Grazing Act. The Court of Appeals reversed, holding the Range Manager acted pursuant to state statute, the Government agent's actions were authorized and the question of liability under the FTCA did not have to be decided. The Supreme Court reversed and held that Federal employees and agents did not comply with a Federal statute, the Taylor Grazing Act and its regulations <u>regardless of state law</u>. The applicable Federal law was "the law of the range and the activities of

Federal Agents are controlled by its provision." 76 S.Ct. at 750. The Federal Government was liabile for "wrongful and tortious acts of its employees committed in an attempt to enforce a Federal Statute which they administered." 76 S.Ct. at 750.

In Schindler v. United States, 661 F.2d 552 (6th Cir., 1981), at 560, the Court, with respect to the duty element of a cause of action for a tortious injury, stated:

> ... the federal regulatory statutes may be relevant in defining the scope of the undertaking of the United States and the Plaintiff's right to rely thereon, if the action is based on alleged failure of the United States to observe its own regulations. The federal regulation or statute may also be relevant in assessing the second element of the cause of action, if, under state law criteria, it may be considered the kind of statute or regulation violation which is negligence per se.

While discussing Section 323 of the Restatement of Torts 2d (undertaking of

obligations gratuitously or for consideration), the Schindler Court, at 561, stated:

> ... the trial court in applying the FTCA should look to the regulatory statute involved or the actual conduct of the United States to determine if it has undertaken gratuitously or for consideration to render services to the plaintiff, such as would be the basis of liability of a private person under like circumstances.

Similarly, relevant information to Ikard's debarment was completely in the hands of employees of the U.S. Army Missile Command (MICOM) and Ikard was totally dependent upon these employees to compile the Administrative Report for the Debarring Official.

In that non-adversarial administrative hearing, Defendant's employees undertook to investigate all matters relevant to Ikard's debarment, causing Ikard to believe that all pertinent evidence required by applicable regulations had

been furnished to the Debarring Official. Plaintiff discoverd after the debarment had run that MICOM employees withheld evidence relevant to his delinquency rate and indicating that his delinquency rate was better than those of other contractors not targeted for debarment. Such evidence is pertinent to the Debarring Official's decision and would have assisted Ikard. This action deprived the administrative hearing of due process, fundamental fairness, and equal protection safeguards.

In Betesh v. United States, 400 F.Supp. 238 (D.C. 1974), the Court held that violation of a Federal Regulation (directing Selective Service examining physicians to advise rejected examinees needing medical attention to seek physician advice) could be the basis for FTCA liability. Under applicable state law, "a federal regulation presumptively

establishes a standard of care" and "establishes a presumption of breach of duty." Ibid., at 243. Accord, Hatahley, supra; Rayonier, Inc. v. United States, 352 U.S. 321, 77 S.Ct. 374 (1957).

In Harr v. United States, 705 F.2d 500 (D.C.Cir., 1983), a pilot brought an FTCA suit because the Federal Aviation Administration denied him a medical certificate qualifying him to resume flying duties. Harr alleged that the FAA negligently examined him and added another disqualifying ground without a reasonable, supporting medical basis and failed to inform him of the additional qualifying ground until immediately prior to his flight status fitness hearing. The District Court granted a Motion to Dismiss. Harr appealed. The Court of Appeals reversed. The Court of Appeals held that FAA regulations create

a duty from the FAA to Harr and that the FAA, through its medical staff, breached its duty by not applying its regulations in a careful manner.

In another category of cases involving violations of federal regulations and statutes by government employees, Courts have held that violations of regulations and statutes constitute negligence under the FTCA pursuant to doctrines such as the "Good Samaritan Doctrine" or by inviting reliance by a foreseeable victim pursuant to a gratuitous undertaking. See S.A. Empresa de Viacao Aerea Rio Grandense v. United States, 692 F.2d 1295 (9th Cir., 1982); United Scottish Insurance Company v. United States, 614 F.2d 188 (9th Cir., 1979), and United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 104 S.Ct. 2755 (1984).

III. VIOLATIONS OF THE UNITED STATES

CONSTITUTION, STATUTES AND REGULATIONS CREATE A FEDERAL TORT CLAIMS ACT CAUSE OF ACTION WHEN THEY ARE INCORPORATED INTO A STATE STATUTE WHICH HAS BEEN VIOLATED.

Alabama law requires attorneys to obey the constitutions and statutes of the United States and State of Alabama and to obey United States regulations having the force and effect of law. Section 34-3-20(1), Code of Alabama, (1975), entitled "Duties of Attorneys", states:

> It is the duty of attorneys: (1) to support the Constitution and the laws of this state and of the United States.

Federal Procurement Regulations have the force and effect of law. Paul v. United States, 371 U.S. 245, 255 (1963); Scanwell Laboratories, Inc. v. Schaeffer, 424 F.2d 859 (D.C.Cir., 1970). Negligence per se, in which a duty is created by statute or regulation, is an Alabama tort. Lowe v. General Motors Corp., 624 F.2d 1373, 1380 (5th Cir. 1980), states:

> Alabama law ... states that violation of a statute is negligence per se if the following criteria are met: (1) The trial judge must determine as a matter of law that the statute was enacted to protect a class of persons which includes the litigant seeking to assert the statute. (2) The trial judge must find the injury was the type contemplated by the statute. (3) The party charged with negligence must have violated the statute. (4) The jury must find the statutory violation must have proximately caused the injury.

Fox v. Barthoff, 324 So.2d 294, 295-296 (Ala.S.Ct. 1979). Attorneys who were employees of MICOM violated (1) the due process clause of the United States Constitution and the Constitution of Alabama of 1901 (Article I, Section 6), (2) equal protection of the laws of the United States Constitution and Sections 1, 6, and 22 of Article I of the Alabama Constitution, 1901, (3) Subpart 9.4 of the Federal Acquisition Regulation (FAR) and Subpart 9.4 of the DOD FAR supplement (particularly DOD FAR supplement 9.472-2(h)'s requirement that the Army

forward administrative reports on a proposed debarment containing a complete summary of all pertinent evidence), and (4) 15 U.S.C. 637(a) of the Small Business Act. Violation by an attorney of a federal regulation, the Small Business Act, the Constitution of Alabama and the Constitution of the United States constitutes negligence per se under Alabama Law. In accordance with Art Metal and Myers & Myers, Inc., supra, the breaches of federal duties are also a breach of Section 34-3-20(1), Code of Alabama (1975). Thus duties under Alabama law exist whereas they did not in the District of Columbia, Pennsylvania and New York cases.

Legal malpractice is an Alabama tort and has three elements: (1) duty, (2) breach of duty and (3) damages caused by the breach. Malloy v. Sullivan, 415 So.2d 1059 (Ala.S.Ct., 1982). Courts

use any of four tests to determine legal malpractice duty: privity of contract, gratuitous undertaking, third party beneficiaries, and foreseeability.

Privity of contract and gratuitous undertaking establish a duty. Guidance for whether Alabama will accept the third party beneficiary rule or the foreseeability rule is found in Malloy v. Sullivan, 415 So.2d 1059, 1060 (Ala.S.Ct. 1982): **"The principle which governs a legal malpractice action based upon negligence is the same as any other negligence action**, the Plaintiff having the burden of proving a duty, its breach which caused injury, and damages." (emphasis added).

Since negligence principles of legal malpractice actions are the same as any other negligence action, the task is to determine the duty threshold in Alabama negligence actions. In Buchanan v.

Merger Enterprises, 463 So.2d 121, 125-126 (Ala.S.Ct. 1984), the Court stated:

> The threshold issue in determining whether a common law negligence action will lie is to determine whether the Defendant owed a duty to a class of persons which included the deceased. The duty issue is essentially a public policy question, i.e., whether the law should impose a requirement on the Defendant that it do or refrain from doing some act for the safety and well-being of the Plaintiff . . . Today there is no requirement of privity between the seller and the injured party in order for an action to lie . . . **The ultimate test of the existence of a duty to use due care is found in the standard and foreseeability that harm may result if care is not exercised.** (emphasis added).

See also Bush v. Alabama Power Company, 457 So.2d 350 (Ala.S.Ct.).

Havard, Palmer & Baker Engineers, Inc., 302 So.2d 228 (Ala.S.Ct. 1974), an action against professional engineers for negligent performance of a tunnel inspection contract with the City of Mobile, Alabama, analyzed engineers' duties to an unrelated third party.

Liability rested on foreseeability of harm to persons who might be injured rather than on privity of contract.

In Berkel & Company Contractors v. Providence Hospital, 454 So.2d 496 (Ala.S.Ct. 1984), Providence contracted with Greenhut to build a new hospital wing. Greenhut subcontracted to Berkel installation of piling supports. When soil conditions slowed installation, Berkel sued Providence for breach of duty of care, negligence, fraud, and misrepresentation. A summary judgment in Providence's favor on lack of privity grounds was reversed, at 501:

> Alabama Courts have rejected the absence of privity of contract as a defense to a negligence action. In Federal Mogul Corp. v. Universal Construction Company, 376 So.2d 716 (Ala.Civ.App. 1979), the Court of Civil Appeals held:
>
> > Our cases hold that, where the charge of negligence is based upon breach of duty arising out of a contractual relationship, no cause arises in favor of one not in privity to the contract. However,

> there are exceptions, such as where there is an evasion of the duty independent or concurrent with the contract . . . **Plaintiff may nevertheless recover for negligence for Defendant's breach of duty where Defendant negligently performs his contract with knowledge that others are relying on proper performance and the result is reasonably foreseeable.** (emphasis added).

These same factors in Biankanja v. Irving, 49 Cal.2d 647, 323 P.2d 16 (1958) imposed a duty on a layman to beneficiaries of a will prepared by the layman. This test (less moral blame) was extended in Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rep. 821, 364 P.2d 685 (1961), cert. denied 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962) to include legal malpractice claims.

Attorneys for MICOM could reasonably foresee that Ikard was relying on them to properly perform their duty to prepare an Administrative Report in compliance with procurement regulations

and the Alabama and United States Constitutions. Their failure to do so is, under Alabama law, negligence actionable under the FTCA.

IV. PLAINTIFF-APPELLANT STATES A CAUSE OF ACTION UNDER THE FEDERAL TORT CLAIMS ACT 28 U.S.C. 1346(b).

Congress's purpose for the FTCA was to provide a meaningful and effective remedy for those injured by negligent or wrongful acts of Government employees. In its absence, a Claimant so harmed would suffer loss with no ability to obtain recompense or justice.

Brown v. United States, 653 F.2d 196 (5th Cir., 1981), at 198:

> . . . Recognizing that those who act for the State are fallible, that Public Servants in the course of their duties injure others, and that the polity should redress such harm, Congress partially waived the United States Sovereign Immunity from Tort Claims by enacting the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et. seq.

In Myers & Myers, supra, the Court

discussed whether refusal to grant a debarment hearing granted a FTCA cause of action and concluded that applicable state law controlled. Sections 1, 6 and 12 of Article I of the Constitution of Alabama, 1901, provide protections afforded by due process and equal protection of the laws. In Alabama, even absent federal regulations and the United States Constitution, Ikard should have had a hearing comporting with due process before debarment and suspension. This was not done.

While Ikard utilizes Appellee's employees' violation of federal procurement regulations to help establish his cause of action, their breach is not the only basis for his complaint. As set forth above, legal malpractice is a tort in Alabama. Malloy v. Sullivan, supra. Legal malpractice is established by violation

of Section 34-3-20(1), Code of Alabama, 1975, and negligent investigation, collection and forwarding of all evidence pertinent to the non-adversarial hearing. MICOM attorneys could reasonably foresee that failure to forward all relevant, accurate evidence could result in harm to Ikard.

Likewise, negligence is an Alabama tort. Appellee's employees' negligence in investigating, collecting and furnishing evidence to the Army Debarring Official and their failure to comply with federal statutes and regulations designed to protect persons in Ikard's position meets Alabama's foreseeability test. See Buchanan v. Merger Enterprises, Inc., supra; Bush v. Alabama Power Company, supra; and Havard v. Palmer & Baker Engineers, Inc., supra. Appellee's attorneys and employees had a duty to comply with all

applicable federal procurement regulations and statutes. These federal regulatory statutes define the requirements of Respondent's employees in regard to the formal debarment of Ikard as well as the de facto debarment of Ikard. See Schindler v. United States, supra; Downs v. United States, supra; Betesh v. United States, supra.

In addition, the violation of Section 34-3-20(1), Code of Alabama, 1975, by attorney-employees of Respondent constitutes negligence per se under Alabama law. See Lowe v. General Motors Corporation, supra.

In Alabama, too, it is a tort for a party to voluntarily undertake to perform an act and then fail to perform the act as a reasonably prudent person would. The employees of Respondent who undertook to formally debar Ikard and prepare the administrative report

ostensibly containing all pertinent evidence for the non-adversarial debarment hearing were obligated to proceed in performing those acts and duties as a reasonably prudent person would. They undertook to protect Ikard's interests in the investigation, collection and furnishing of all pertinent evidence bearing on Ikard's debarment (all of which was in their hands).

In Walden v. Unites States Steel Corporation, 759 F.2d 834 (11th Cir., 1985), Walden was killed in a mine while an employee of Cowin & Company. The mine was voluntarily inspected by U.S. Steel. U.S. Steel's voluntary inspections could be the basis for a negligence action, at 837:

> Under Alabama law, once a person voluntarily undertakes safety inspections, he must act as a reasonably prudent person regardless of whether he originally intended to assure the

safety of anyone other than himself. See Beasley v. MacDonald Engineering Co., 287 Ala. 189, 192-194, 249 So.2d 844, 846-848 (1971).

Further, in D. L. Parker v. Thyssen Mining Construction, Inc., 428 So.2d 615, 618 (Ala.S.Ct. 1983):

> Alabama recognizes that one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for negligence in connection therewith. Dailey v. City of Birmingham, 378 So.2d 728 (Ala. 1979); United States Fidelity and Guaranty Company v. Jones, 356 So.2d 596 (Ala. 1978). However, the existence of a voluntarily assumed duty through affirmative conduct is a matter for determination in light of all the facts and circumstances. Professor Prosser noted that "[J]ust when the duty is undertaken, when it ends, and what conduct is required, are nowhere clearly defined, and perhaps cannot be." W. Prosser, Handbook of the Law of Torts, Section 56, at 344 (4 Ed. 1971).

See Stauffer Chemical Company v. W. D. Brunson, 380 F.2d 174 (5th Cir., 1967).

The Restatement of Torts, Second Edition, defines duty in Section 323:

> Negligent Performance of Undertaking to Render Services. One who

> undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to the liability for the physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Similarly, in Section 324(a):

> Liability to Third Person for Negligent Performance of Undertaking. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from this failure to exercise reasonable care to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of such harm,
>
> (b) he is undertaking to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Alabama's Voluntary Act Doctrine imposes a duty on Appellee's officers, employees and attorneys to act as a reasonably

prudent person would regardless of whether they were acting voluntarily or pursuant to federal statutes and regulations. Simply put, the existence of federal statutes and regulations is not relevant to liability imposed by Alabama's Voluntary Act Doctrine and, as such, Respondent is liable under the FTCA just as a private person would be under the law of Alabama.

V(a). VIOLATIONS BY UNITED STATES' EMPLOYEES OF FEDERAL STATUTES, FEDERAL ACQUISITION REGULATIONS, THE UNITED STATES CONSTITUTION, ALABAMA STATUTES, ALABAMA COMMON LAW OR THE ALABAMA CONSTITUTION ARE NOT EXCEPTED UNDER THE FTCA AS AN EXERCISE OF A DISCRETIONARY FUNCTION.

The lower courts adopted Respondent's use of 28 U.S.C. 2680(a)'s exception to the FTCA prohibiting claims based on a "discretionary function". Ikard counters that governmental discretion exists for decisions on how to best accomplish the job at hand (See Dalehite

v. United States, 436 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953)) but not to conduct which has is no discretion. Particularly appropriate is Avery v. United States, 437 F.Supp. 937 (D.C.D.Conn. 1977):

> Regardless of the level or context of a particular Government act, however, the official involved must act in accordance with certain limits within his discretion. It is true that Section 2680(a) excepts the Government from liability for officials performing discretionary functions, "whether or not the discretion involved be abused." **But there is a difference between discretion and lack of discretion.** An official who abuses discretion by acting arbitrarily or discriminatorily, for example, will be protected by 2680(a). But an official with no discretion in a particular area has no discretion to abuse; he can only act in excess of his authority. (emphasis added).

Avery analyzed Hatahley v. United States, supra (which held that wrongful trespasses by federal agents did not involve discretion and gave rise to claims cognizable under the FTCA) and commented, at 434 F.Supp. 844:

> If trespasses and violation of Government regulations are not "discretionary functions," then, a fortiori, trespasses in violation of constitutional guarantees are not "discretionary functions." See Simons v. United States, 413 F.2d 531 (5th Cir. 1969); DeBonis v. United States, 103 F.Supp. 123 (W.D.Penn. 1952) (dictum); C.F. Kiiskilave v. United States, 466 F.2d 626 (7th Cir., 1972).

Further, in Myers & Myers, Inc. v. United States Postal Service, supra, the Government argued that the granting or denial of contracts was a "discretion in function". The Court was not persuaded and reasoned, at 527 F.2d 1261:

> The Government renews its argument that the "discretionary function" applies. But here the Appellant's argument is that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment form Government contracting. **It is, of course, a tautology that a Federal Official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority . . . This distinguishes cases . . . which hold that even though discretion is abused, its exercise cannot give rise to a Federal Tort Claim . . . For here, the Appellant's claim is**

that the Postal Service lacked discretion to act in disregard of its own applicable regulations and of the Constitution. (emphasis added).

As the cases note, it is Marbury v. Madison, 1 Cranch 137, 170, 2 L.Ed. 60 (1803), which provides authority for the general proposition that a Government Official cannot have discretion to commit unconstitutional or illegal acts.

These cases buttress Ikard's position that government's employees have no discretion to violate Alabama law, Federal statutory law, the Alabama Constitution, the United States Constitution or applicable Federal Acquisition Regulations. In the absence of discretion, U.S.C. 2680(a)'s "discretionary function" exception is inapplicable as a defense.

V(b). VIOLATIONS BY UNITED STATES' EMPLOYEES OF FEDERAL STATUTES, FEDERAL ACQUISITION REGULATIONS, THE UNITED STATES CONSTITUTION, ALABAMA STATUTES, ALABAMA COMMON LAW OR THE ALABAMA CONSTITUTION ARE NOT EXCEPTED UNDER

THE FTCA AS PART OF THE "NO ANALOGOUS PRIVATE LIABILITY" EXCEPTION.

The lower courts accepted Respondent's arguement that Ikard failed to meet 28 U.S.C. 1346(b) requirement that liability exist "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". In Cerri et. al. v. United States, 80 F.Supp. 831, N.D.Cal., S.D. (1948), a bystander was wounded by a shot fired by a soldier on guard duty attempting to halt a civilian under arrest. The United States denied liability because, under California law, "the sovereign police power cannot be delegated to a private individual and therefore, no private individual is liable for the tortious acts of a special policeman employed by him when such acts are committed by such employee

while acting in the line of his duty as a police officer.", at 833.

The Court rejected the government's argument, at 833:

> The defense that this act does not apply to those cases wherein the negligence occurred during the exercise of a sovereign power of the United States, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. **Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress.** Certainly the statute itself makes no distinction between governmental activities of a sovereign nature and those of a proprietary nature, nor does it include within the claims exempted, 28 U.S.C.A. Section 943, those of this type.
>
> There can be no allegation that the Federal Tort Claims Act constitutes a delegation of sovereign power to any private individual. Read full, the act is the simple giving of the consent of the United States to tort actions against itself.
>
> **The phrase " * * * where the United States, if a private person, would be liable * * * ,"** 28 U.S.C.A. Section 921 and Section 931 [now 1346(b)], **is not to be understood to mean that the**

United States can be sued only if a private person can be sued under the identical circumstances. This phrase does not determine the relationship of the government to its employees, but rather determines the relationship of the government to third parties. **The act gives the consent of the United States to be treated by the injured party as if it were a private individual, amenable to court action without claim of immunity, in all those cases, not exempted by the act, where the negligence of its agents, servants or employees has caused injury or damage to third parties.** (emphasis added).

In Betesh v. United States, supra, violation of a Federal Regulation could be the basis for liability under the FTCA. In response to the claim that no analogous private liability could exist because no private doctors were subject to the regulation, the Court found that "like circumstances" does not require that "every aspect of a cause of action be identical to an action between private parties." Ibid., at 244. Courts should take into account aspects unique to Governmental functions such as

Governmental regulations. See Hatahley, supra; Rayonier, Inc. v. United States, 352 U.S. 321, 77 S.Ct. 374 (1957).

Ikard submits the lower courts' interpretation of the "analogous private person liability" requirement is contrary to Betesh, supra, and Cerri, supra, and thwarts the intent of the FTCA by blocking relief to third parties who are wrongfully injured by government employees. Cerri, supra, stated at 80 F.Supp. 833, "Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress."

VI. A PARTIAL OVERLAP BETWEEN TWO TORT ACTIONS DOES NOT SUPPORT A CONCLUSION THAT IF ONE IS EXCEPTED UNDER THE FTCA, THE OTHER MUST BE AS WELL.

Respondent's Motion to Dismiss stated that "Plaintiff's allegations all arise

out of tortious interference with contract rights and misrepresentation, both of which are expressly excepted from the provisions of the FTCA, 28 U.S.C. 2680(h)." An overlap between two tort actions does not support a conclusion that if one is excepted under the FTCA the other must be as well. See Block v. Neal, 460 U.S. 289, 103 S.Ct. 295 (1983). Taking Appellee's argument to its extreme would mean that any tortious conduct which also violates debarment regulations or deprives property or liberty interests without due process of law falls under interference with contractual relations.

A broad definition of misrepresentation will also shield the Government completely from any liability. The gist of Ikard's cause of action is the negligent investigation and collection of pertinent evidence for the report to

the Debarring Official, the negligent investigation and collection of evidence regarding Ikard's contract with MICOM, and the negligence of employees, attorneys and agents of MICOM who did not comply with applicable provisions of federal regulations, Federal statutes and the Constitutions of the United States and Alabama.

While misrepresentation and negligence claims might have a common basis, "Neither the language nor history of the act suggests that when one aspect of the Government's conduct is not actionable under the 'misrepresentation' exception, a Claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct." Block v. Neal, supra, at 104 S.Ct. 1094.

In Block, Plaintiff received a loan from the FHA to finance the construction of a new home. Regulations required the

FHA to provide technical assistance to the borrower, to review the construction plans and contract, and to make inspections. After moving into the house, Neal discovered defects and asked the FHA to pay to correct them. Upon refusal, Neal sued under the FTCA and alleged the defects were caused by the FHA's negligence in inspecting and supervising construction. The issue was whether the action was barred under Section 2680(h) as a "claim arising out of . . . misrepresentation." The Court distinguished United States v. Neustadt, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed. 614 (1961), a case involving a pre-purchase inspection and appraisal of the home by FHA, and found that the gravaman of the action in Neustadt was the Plaintiff's being mislead by a Government appraisal. Neustadt alleged no injury independent of reliance on the erroneous appraisal.

In contrast, the Government's misstatements were not essential in Neal's claims and the Court stated that the Government's duty to use due care in supervising and inspecting construction is "distinct from any duty to use due care in communicating to respondent." 460 U.S. at 297.

Because Neal sought to recover for a breach of duties distinct from duties forming the basis for a claim barred by Section 2680(h), her claim was lawful.

Likewise, Ikard seeks recovery for breach of duties distinct from misrepresentation or a tortious interference with contractual relations.

The Alabama tort of intentional interference with business or contractual actions is defined in Gross v. Lowder Realty, 494 So.2d 590 (Ala. 1986). Ikard's complaint did not allege knowledge of any intentional acts by the

Defendant or its employees or agents. The elements of intentional interference with contractual relations are not present in Ikard's action.

CONCLUSION

Jerry W. Ikard asks the Court to hold that his Complaint states a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and that the discretionary function exception of 28 U.S.C. 2680(a) and the tortious interference with contractual relations and misrepresentation exception of 28 U.S.C. 2680(h) are not present and therefore do not bar his claim.

Wherefore, Appellant prays this Court will reverse the order and final decision appealed from and remand the action for further proceedings.

Respectfully submitted,

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Morris J. Brooks, Jr.

Morris J. "Mo" Brooks, Jr.
9009 Randall Rd.
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CERTIFICATE OF SERVICE

I, Don A. Howard, of Uhrig, Munger and Howard, Counsel of Record for Petitioner Jerry W. Ikard, d/b/a Ikard Manufacturing Company, pursuant to Rules 28.2, 28.3, 28.4 and 28.5 of the Rules of the United States Supreme Court, hereby certify that I, on September 27, 1988, served three (3) copies of the original draft of the foregoing Petition for Writ of Certiorari, including the Appendix, upon:

1. United States Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Mr. Frank W. Donaldson

United States Attorney
ATTN: Mr. Herbert J. Lewis, III
Assistant U.S. Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, AL 35203

by mailing said copies of the same to them by depositing the same in a United States Post Office, with first-class (priority), postage pre-paid at the addresses stated above and I further certify that I have this day served three (3) copies of this corrected (pursuant to Rule 33.7) Petition for Writ of Certiorari, including the Appendix, upon:

1. United States Solicitor General
Department of Justice
Washington, D.C. 20530

2. Mr. Frank W. Donaldson
United States Attorney
ATTN: Mr. Herbert J. Lewis, III
Assistant U.S. Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, AL 35203

by mailing said copies of the same to them by depositing the same in a United

States Post Office, with first-class (priority), postage pre-paid at the addresses stated above .

Done this the 20 day of October, 1988.

Don A. Howard
Attorney for Petitioner
Jerry W. Ikard, d/b/a Ikard Manufacturing Company
Uhrig, Howard & Munger
3307 Bob Wallace Ave., Suite One
Huntsville, AL 35805
(205) 533-2201

STATE OF ALABAMA

COUNTY OF MADISON

SWORN TO and subscribed to before me on this the 20th day of October, 1988.

Notary Public
My Comm. Exp.: 5/27/92